



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/013/
JDC/2008/002
UNDT/NY/2009/014/
JDC/2008/003
Judgment No.: UNDT/2010/034
Date: 25 February 2010
Original: English

Before: Judge Goolam Meeran

Registry: ATIONS424T7J3 .121d 40kTT4 1 Tf-10.5 -2.26 TD.0009 Tc0lr(84r Tc(Before:)Tj

Introduction

1. These cases involve summary dismissal for serious misconduct.
2. Both applicants received a letter dated 8 November 2007 informing them that the Secretary-General had decided that they be summarily dismissed in accordance with staff regulation 10.2 applicable at that time. The dismissal took effect immediately upon receipt by the applicants of the letter of 8 November 2007.
3. The decision of the Secretary-General was arrived at after considering a report from the Procurement Task Force (PTF) dated 20 June 2007. The PTF carried out an investigation into conduct which had taken place on an evening in August or September 2002. It was alleged that both applicants accepted hospitality from a representative of a vendor company and that such hospitality was lavish and inappropriate. Furthermore it was in violation of the Organization's guidance, rules and policy and inconsistent with the high standards of conduct expected of staff members in the Procurement Division.

Background

4. The applicants lodged an appeal against this decision by presenting an application for review to the Joint Disciplinary Committee (JDC). It was the consistent position of the respondent that the decision to summarily dismiss the applicants was legally correct and arrived at as a result of a proper and fair investigation and that the penalty of summary dismissal was proportionate to the

- iv. Were the applicants given the opportunity to advance arguments, submissions as to special circumstances and mitigation before a decision was taken on the appropriate penalty?
- v. Was there sufficient material before the Secretary-General to justify a finding by him that there was misconduct?
- vi. If so, was the misconduct in question of sufficient severity to merit a finding of serious misconduct?
- vii. If not, could the sanction of dismissal be justified?
- viii. If the misconduct was of sufficient severity to merit a finding of serious misconduct was the sanction of dismissal appropriate?
- ix. If it was, was the extreme sanction of summary dismissal fair in the circumstances?
- x. If it was not, should there have been dismissal on some other terms and if so, what?

9. The fact that disciplinary proceedings took place five years after the event in question requires an explanation. The incident only came to light as a result of evidence given in a criminal trial in the course of a federal prosecution in the Southern District of New York, arising out of the PTF report dated 27 July, 2006.

10. The defendant in the criminal proceedings was a senior United Nations Procurement Officer. A representative of two vendors, who were in a business relationship with the UN, through the procurement process, was a prosecution witness. In the course of his evidence he indicated that he had offered lavish hospitality to two staff members of the UN Procurement Division. He claimed that he had spent about USD6,000 that evening providing them with drinks and

12. Whatever be the answers to these questions it has not been disputed by any of the parties that there was a duty on the Secretary-General to ensure that any investigation conducted on his behalf should be done with the utmost propriety and the observance of internationally respected norms of justice and fairness in conducting internal disciplinary proceedings. All staff members are entitled to the protection afforded to them by the UN's internal procedures for the handling of disciplinary cases.

Applicable rules

13. Former staff regulation 10.2 stated that "The Secretary-General may summarily dismiss a member of staff for serious misconduct". Paragraph 9(c) of ST/AI/371 "Revised Disciplinary Measures and Procedures", of 2 August 1991, states that the evidence should clearly indicate that misconduct had occurred and that if the seriousness of the misconduct merited separation from service the Assistant Secretary-General of Human Resources may recommend to the Secretary-General:

9. On the basis of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, shall proceed as follows:

(...)

(c) Should the evidence clearly indicate that misconduct has occurred, and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the staff member be summarily dismissed. The decision will be taken by or on behalf of the Secretary-General.

14. The Procurement Division's "Guidelines on Acceptance of Gifts and Hospitality by the Procurement Division Staff" (rev.1) of 18 January 2001, which is relevant, provides as follows:

"It is an overriding importance that staff members acting in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as to show favourable treatment to an individual or entity by accepting offers of gifts and hospitality or other similar considerations. The staff member should have regard not simply as to whether they feel themselves to

have been influenced, but to the impression that their actions will create on others. Due to the needs to stress the importance of the appearance of strict independence and impartiality of staff in the Procurement Division, the following guidelines are provided:

In principle, UN staff members shall not accept any honour, decoration, favour, gift or remuneration from any source without first obtaining the approval of the Secretary-General.”

15. It should be observed straightaway that these cases do not involve the acceptance of “any honour, decoration, gift or remuneration”. However the provision of lavish hospitality could conceivably come under the description of “favour”.

16. Following an internal audit and inve

was a breach of the relevant UN rules, guidelines and policies which are binding on all staff members of the United Nations.

19. The United Nations Administrative Tribunal's (UNAT) jurisprudence is replete with a number of cases dealing with disciplinary matters and the appropriate principles to be followed in considering whether or not a case of serious misconduct had been made out, and if so, whether the sanction of summary dismissal was appropriate. In my Judgment *Manokhin* UNDT/2009/006, a case which also concerned disciplinary action following an internal investigation, I stressed the importance of examining the thoroughness and fairness of internal UN investigatory procedures. I considered whether the internal disciplinary investigations complied with the principles of natural justice and concluded that there were no procedural irregularities in the investigation and that the sanction of summarily dismissal was proportionate to the misconduct. As stated in my previous Judgment *Kouka* UNDT/2009/009, the case that is usually referred to is the UNAT Judgment No. 941 *Kiwanuka* (1999). In that case, the UNAT set out certain standards, which comply, broadly speaking, with the principles of natural justice and internationally recognized standards for reviewing administrative decisions in relation to disciplinary matters in an employment context.

20. Judgment *Kiwanuka* encapsulates internationally recognized norms of fairness which can be summarized as follows:

- a. Whether the facts resulting in summary dismissal had been established (that is, whether the findings made are reasonably justifiable and are supported by the evidence);

Division staff to the extent of approximately USD6,000. The entertainment included dinner, drinks, female company and a visit to a lap-dancing nightclub. Both applicants subsequently identified themselves as the individuals referred to in the representative's testimony. An important question is the extent to which the PTF relied on the evidence of a person of questionable character. The applicants were entitled to express their concern about reliance on the testimony of such an individual. However, both applicants admitte

investigation, there was no finding that impugned the independence and impartiality of the applicants. However, there does remain the question that whatever may have been in their minds, did they put themselves in a position whereby they were engaged in activity that was incompatible with their duties in the Procurement Division? Did they in fact engage in activity that could have had an adverse impact upon their status and the public perception of themselves as international civil servants engaged in procurement duties? What was the degree of risk that their activities could have given the wrong impression to others by their socializing with the representative of vendor companies? Could they possibly have put at risk the integrity of the UN Procurement Division and the standing of the UN itself?

27. Whatever may be the shortcomings of the PTF investigation there was sufficient material before the PTF in the form of corroboration through the individual versions of each applicant to provide the Secretary-General with the basis for accepting the PTF report to commence disciplinary action against them.

Failure to report

28. It was common ground that neither applicant had reported

29. On the question of disclosure to a higher authority it should be noted that the senior Procurement Officer was at that time the recipient of gifts and favours and other benefits from the representative of the two UN vendors and for which he was subsequently convicted. Neither applicant was aware, at the time, of the senior Procurement Officer's improper dealings with the vendors' representative.

they had the opportunity to do so during the course of the PTF investigation.

- d. Neither applicant reported the fact that they had received lavish hospitality from a UN vendor.
- e. There was no finding that the applicants had conferred any favours or privileges on the representative's group of companies.
- f. Whatever criticisms the applicants have or may have had about the shortcomings of the PTF investigation they admitted in substantial part the facts on which the disciplinary charges were based.
- g. In accepting hospitality from the vendors' representative they put at risk the reputation and standing of the UN Procurement Division.
- h. There was widespread adverse media reporting of the allegations made by the vendors' representative and this attracted legitimate expressions of concern and criticism on the part of Member States.
- i. There was sufficient material before the Secretary-General, after a fair and impartial investigation, and having regard to the applicants' long service record, to reach a finding of serious misconduct.
- j. The applicants were given a full opportunity to put forward arguments, comments, submissions and mitigation before a decision was taken as to the appropriate sanction.
- k. The Secretary-General has a duty and responsibility to require of staff members and officials the highest standards of conduct so that they do not in any way place themselves in a position where they could put at risk the reputation and standing of the United Nations.

42. For all these reasons there was sufficient evidence that both applicants had committed misconduct and further that the misconduct was serious. In all the circumstances it cannot be said that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences.

Judgment

43. The applications are dismissed.

(Signed)

Judge Goolam Meeran